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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 668

DONALD J. GARRISON AND CLOVIS N. OOLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 19–28) is not yet reported. A previous opinion of the Court of Appeals is reported at 280 F. 2d 493. The opinion of the District Court (App. 30–35) [1] is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1961 (Pet. App. 28). A petition for a rehearing was denied on December 18, 1961. The petition for a writ of certiorari was filed on Jan-

[1] "App." refers to the appellant's appendix in the court of appeals.

uary 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a mail fraud prosecution the trial court properly denied petitioners' motion for a new trial on the ground of newly discovered evidence, where a government witness in a later similar trial in another jurisdiction gave testimony in conflict with her testimony in the first trial on immaterial issues.

STATEMENT

Petitioners Garrison and Ooley were convicted of mail fraud and conspiracy in the Eastern District of Wisconsin. Each petitioner was fined $5,000 on Count 1 and given concurrent sentences of imprisonment for three years on each of the remaining ten substantive counts. On appeal, the convictions were affirmed. *United States* v. *Garrison*, 280 F. 2d 493 (C.A. 7).

The general nature of the scheme to defraud is set out in footnote 1 of the Court of Appeals' opinion of October 31, 1961 (Pet. App. 20–23). The scheme involved placing newspaper advertisements in Wisconsin newspapers circulating through the United States mail for the sale of vending machines for Gillette Blue Blades. Petitioners made false representations to the defrauded parties, who responded by mail, that petitioners' company, Bell Merchandising Automatically, Inc., had a B–1 Dun and Bradstreet rating, that it was backed financially by the Gillette Company, and that the company would repurchase the

machines if the purchasers became dissatisfied as to the income from them.

Thereafter, on September 19, 1960, petitioners, with six other defendants, were tried for a similar mail fraud in the United States District Court for the Eastern District of Missouri at St. Louis, Missouri. One of the companies named in the later indictment was the Silver King Distributing Company which also handled Gillette vending machines, and by which petitioners had been employed prior to forming their own company, Bell Merchandising, involved in the Wisconsin trial (App. 2). On the basis of testimony of a government witness, Mrs. Snelson, who testified at both trials, petitioners filed a motion for a new trial in the Wisconsin case on the grounds of newly discovered evidence (App. 22-30). The pertinent facts may be summarized as follows:

1. *The Wisconsin trial.*—At the trial in Wisconsin, Mrs. Snelson testified that she was employed by Bell Merchandising in St. Louis during April and May 1956 and worked for petitioners Garrison and Ooley. She did general office work, mailed advertisements to newspapers, and did some typing (App. 3). Before going to work for Bell Merchandising, she had worked as a secretary for Silver King Distributing Company in St. Louis where petitioners were salesmen (App. 4). The following is part of Mrs. Snelson's testimony (App. 5-6):

> Q. And who was it you worked for at Silver King?
>
> A. Pete Krane.
>
> Q. Anybody else?

A. Yes, I worked under one of the others—I was working for one of the others at all times.

Q. Was it their company, those two that had——

A. I don't know Jack DeWees.

Q. Were they your bosses?

A. Yes.

* * * * *

Q. All right. Now, in so far as the Defendants' Exhibit 57 is concerned, when Mr. Garrison or Mr. Ooley were salesmen for Silver King Distributing Company, did they have one of these sales kits—or whatever they call them—or sales brochures?

* * * * *

A. Yes.

Q. And when they started for themselves it was substantially the same type of sales material, sales kit; isn't that right?

A. Yes.

Q. Now, in so far as the pitch or sales talk, when they were working for Silver King they had a sales pitch or sales talk that was given to them by the owners of Silver King; isn't that right?

A. No, sir.

Q. You say they were not given a sales pitch, or that you don't know about it?

A. I have never known a salesman to get a sales pitch from Silver King.

Q. I see.

A. They—I——

Q. Did the salesmen have a sales pitch there at Silver King?

A. I was told they did.

Q. You were told they did. I see. But you did not prepare it?

A. No, I did not.

Q. They had it, but you did not prepare it?

A. No.

Mrs. Snelson testified that, when she was working at Silver King, Pete Krane and Jack DeWees were also working there as salesmen (Gov. App. 102).[2] Petitioner Garrison testified that he worked for Krane and DeWees at Silver King (Gov. App. 102–103). Petitioner Ooley testified that he also worked for DeWees at Silver King, and that Mrs. Snelson typed out a sales pitch for the salesmen there (Gov. App. 103–104).

2. *The Missouri trial.*—Mrs. Snelson testified that she had been employed at Silver King; that DeWees had hired her; and that she had typed six copies of a sales pitch (Gov. Ex. 299) and given them to Silver King salesmen (App. 7). On cross-examination, parts of Mrs. Snelson's testimony at the Wisconsin trial were read to her. She admitted giving testimony that she had not prepared a sales piten at Silver King (App. 11–12), but stated that she thought the questions related to Bell Merchandising, not to Silver King (App. 14). She stated that she did not recall her answer that she did not know Jack DeWees (App. 13). The trial court sustained a defense motion for a mistrial by reason of the conflict between her testimony as to the above items in the Wisconsin and Missouri cases (App. 16–21). A citation was

[2] "Gov. App." refers to the appendix of the government in the court of appeals.

issued for Mrs. Snelson to show cause why she should not be found in contempt of court (App. 21–22).

3. *The rulings on the motion for a new trial.*—Petitioners filed a motion for a new trial in the Wisconsin case on the ground of newly discovered evidence as a result of Mrs. Snelson's contradictory testimony given at the Missouri trial (App. 22–30). The trial court was of the opinion that the allegedly false testimony related to minor details having no materiality to the essential elements of the charges in the indictment, *i.e.*, the use of the mails and the intent to defraud (App. 30–35). In affirming, the court of appeals held that the district court had not abused its discretion in denying the motion for a new trial (Pet. App. 27).

ARGUMENT

The district court properly denied petitioner's motion for a new trial on the ground of newly discovered evidence.[1] Even when such a motion is based upon an allegation that a prosecution witness gave false or incorrect testimony, the motion should be denied unless it is shown that without the false testimony the jury might have reached a different result. The

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[1] *Larrison* v. *United States*, 24 F. 2d 82, 87 (C.A. 7); *United States* v. *Johnson*, 142 F. 2d 588, 591 (C.A. 7), petition for certiorari dismissed, 323 U.S. 806; *United States* v. *Johnson*, 149 F. 2d 31, 44 (C.A. 7), reversed on other grounds, 327 U.S. 106; *Gordon* v. *United States*, 178 F. 2d 896, 900 (C.A. 6), certiorari denied, 339 U.S. 935.

This Court's recent decision in *Mitchell* v. *United States*, No. 448 Misc., decided January 22, 1962, did not go into or change the existing requirements for a motion for a new trial.

courts below properly held that the portion of Mrs. Snelson's testimony alleged to be false was of no importance to the issues being litigated.

As the district court pointed out (App. 32), Mrs. Snelson's testimony in the Wisconsin trial that she did not know DeWees was given as an unresponsive answer to an incomplete question (App. 5) and later testimony showed that she knew him as one of the salesmen at Silver King (Gov. App. 102). As to her testimony that she did not prepare a sales pitch at Silver King and had never known a salesman to get a sales pitch from Silver King, it was, as the court pointed out, amplified by her testimony that she was told that the Silver King salesmen had a sales pitch (App. 6). Furthermore, the existence of a sales pitch at Silver King had little materiality to the question of whether petitioners committed fraud in their own business, through Bell Merchandising. There was direct evidence that petitioners caused advertisements for sale of the vending machines to be placed in newspapers; that within a few days thereafter the ten persons defrauded responded by letter to the post office box listed; that petitioners visited the parties defrauded and made oral misrepresentations to them; and that, after signing a contract and paying part of the contract price, each party received a letter in the mail confirming the contract and the payment made. Moreover, whatever Silver King's sales talk was, it would not excuse the clearly fraudulent representations as to Bell's financial standing which were proved at the trial (ft. 1, Pet. App. 21–22).

None of the cases relied upon by petitioner involves testimony as immaterial as that in this case. None is applicable to the factual evaluation involved in the district court's ruling in this case.

CONCLUSION

The decision below is a proper application of established principles to a particular factual situation. No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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